

McNamara Declaration

Exhibit 5

ATTORNEYS' EYES ONLY

Page 1

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE SOUTHERN DISTRICT OF NEW YORK
3
4

5 HACHETTE BOOK GROUP, INC.,
6 HARPERCOLLINS PUBLISHERS LLC,
7 JOHN WILEY & SONS, INC., and
8 PENGUIN RANDOM HOUSE LLC,

9 Plaintiffs,

10 vs.

No. 1:20-cv-04160-JGK

11 INTERNET ARCHIVE and DOES 1
12 through 5, inclusive,
13 Defendants.
14 _____/

15 -- ATTORNEYS' EYES ONLY --

16 VIDEOTAPED RULE 30(B)(6) DEPOSITION OF
17 INTERNET ARCHIVE, BY BREWSTER KAHLE
18 Remote Zoom Proceedings
19 San Francisco, California
20 Thursday, December 9, 2021
21

22
23 REPORTED BY:

24 LESLIE ROCKWOOD ROSAS, RPR, CSR 3462

25 Pages 1 - 288

Job No. 4882313

ATTORNEYS' EYES ONLY

Page 17

1 publishing system that allowed publishers -- and many of
2 our clients were publishers -- to go and make their
3 information available on the internet.

4 Q. And did you ultimately sell WAIS Inc.?

5 A. Yes.

6 Q. Who did you sell it to?

7 A. America Online.

8 Q. And was that in about 1995?

9 A. Correct.

10 Q. And you sold it for approximately \$15 million;
11 is that right?

12 A. Approximately.

13 Q. And as part of that sale, did the sale include
14 computer code?

15 A. Yes.

16 Q. And did it include any patents?

17 A. I'm not sure. I -- I'm not sure.

18 Q. And so the computer code that you sold to AOL,
19 those copyrights are now held by AOL; is that right?

20 A. I believe AOL dispensed with them either to
21 another company or just abandoned them.

22 Q. But at the time they paid you \$15 million, it
23 was in part for the copyrights, that they were acquiring
24 the source code; isn't that right?

25 A. They were acquiring the company, and the company

ATTORNEYS' EYES ONLY

Page 19

1 Q. And did it -- did it register those copyrights?

2 A. You mean by going and posting them to the
3 Copyright Office of the United States?

4 Q. Yes.

5 A. It did not do that, no.

6 Q. But they were, in fact, copyrights; were they
7 not?

8 A. If I understand it, everything expressed. I'm
9 not a lawyer, but how copyrights -- and I think
10 everything's copyrighted.

11 Q. Was Alexa's internet services --

12 A. Actually, that's not true. Not everything is
13 copyrighted. But I think the code that Alexa wrote, by
14 writing it and expressing it in the United States at that
15 time made it copyrighted, I think. That's.

16 Q. That's --

17 A. But that's -- not a lawyer.

18 Q. Thank you. No, I think you're right. I don't
19 think we would disagree with that.

20 And during the time that you owned Alexa
21 Internet, were services offered for free?

22 A. Yes.

23 Q. And ultimately, though, it was -- it was sold to
24 Amazon; is that not correct?

25 A. The company Alexa Internet was sold to Amazon,

ATTORNEYS' EYES ONLY

Page 23

1 this context as shorthand for the book services provided
2 by the Internet Archive and available on various Internet
3 Archive websites, whether that's Open Library or Open
4 Libraries or Archive.org. Okay?

5 I don't want to get confused on terminology.
6 I'm just going to say "Internet Archive," and what I'm
7 meaning in this context are the book services offered by
8 Internet Archive.

9 A. So how would I express things that are outside
10 of that context if the words Internet Archive are now
11 defined to be just the book services --

12 Go ahead.

13 Q. Thank you.

14 And if you need clarification, please ask me to
15 clarify. I just don't want to get tripped up if I use
16 the word "Open Library" and you're referring to Open
17 Libraries with an "S" or if it's Archive.org. I'm
18 generally always talking about the book services that are
19 provided.

20 A. Okay. I'll -- I'll -- I'll try to be clear.

21 Q. Good. Thank you.

22 Now when did you found Internet Archive?

23 A. I -- the organization started in 1996.

24 Q. And is it fair to say that from the outset, the
25 mission of Internet Archive is universal access to

ATTORNEYS' EYES ONLY

Page 24

1 acknowledge?

2 A. That's our motto.

3 Q. And when you say "motto," what do you mean?

4 A. That's -- it's the colloquial phrase that's used
5 by the Internet Archive to express what its aspirations
6 are.

7 Q. Okay. And has the purpose or this motto of
8 Internet Archive changed over time concerning books?

9 A. Concerning books? It has changed. It -- the
10 beginning of the Internet Archive as a company, as a
11 non-profit library it -- it didn't have that phrase. The
12 phrase that was used most frequently back then was
13 building a digital library.

14 Q. And when you say "back then," what are you
15 talking about?

16 A. 1996.

17 Q. Okay. When was it decided that Internet Archive
18 should distribute digital books? Was that in 1996?

19 A. The Internet Archive in 1996 crawled websites
20 and then made those -- well, actually...

21 In 1996, the Internet Archive did not do
22 anything more than preserve digital materials that were
23 donated to it.

24 Q. When did Internet Archive decide that it was
25 going to distribute digital books to the public?

ATTORNEYS' EYES ONLY

Page 25

1 MR. GRATZ: Objection to form.

2 THE WITNESS: I'm not sure what it means for a
3 non-profit to decide, but I can tell you when we -- the
4 Internet Archive started doing things. Is that helpful?

5 Q. BY MS. MCNAMARA: Yes. Tell me when did the
6 Internet Archive begin to distribute digital books to the
7 public.

8 MR. GRATZ: Objection to form.

9 THE WITNESS: The Internet Archive started to
10 host digitized books probably approximately 2000, 2001.

11 Q. BY MS. MCNAMARA: When you say "host digitized
12 books," a person who went to the Internet Archive site,
13 they could either read on the site those books or
14 download those books; is that right?

15 MR. GRATZ: Objection to form.

16 THE WITNESS: To be clear, the -- there were
17 books that were keyed in by Project Gutenberg that were
18 then uploaded to the Internet Archive website servers,
19 and those would then be available for free public access
20 as a library.

21 Q. BY MS. MCNAMARA: And as -- and when you say
22 "free public access" to answer my question, someone who
23 came to the site could either read the book on the site
24 or download it and read it that way; is that right?

25 A. The files would be on the Internet Archive

ATTORNEYS' EYES ONLY

Page 26

1 servers, and a user would come and click on them. And in
2 that era, I think you would download the public domain
3 text that is the Project Gutenberg text of public domain
4 materials.

5 Q. And ultimately -- I'm going to get to this, but
6 ultimately, Internet Archive did not only host and make
7 available for reading public domain materials; is that
8 right?

9 A. In sort of the 2000 -- what we were talking
10 about, 2000, 2001, the -- the first collections were --
11 the first collection was Project Gutenberg, which they
12 attested were public domain materials.

13 Q. Maybe I wasn't clear, Mr. Kahle.

14 A. Yeah, I'm sorry. Maybe I should ask --

15 Q. No. So if you don't understand, and please, you
16 know, tell me.

17 I asked at some point -- I'm not asking right
18 now precisely when, but at some point, Internet Archive
19 began to host and make available for reading or download
20 in copyright books as well as public domain; isn't that
21 right?

22 MR. GRATZ: Objection to form.

23 THE WITNESS: It's not the way that I look at
24 it. They -- much later, the Internet Archive digitized
25 books and made those available to the blind and dyslexic

ATTORNEYS' EYES ONLY

Page 27

1 in a controlled encrypted way.

2 Q. BY MS. MCNAMARA: You're not -- you're not
3 testifying here under oath, Mr. Kahle, that Internet
4 Archive only makes books available to the blind; is
5 that -- are you?

6 A. The Internet Archive holds books, physically
7 digitizes them, and makes them available in many
8 different ways.

9 Q. And so you're -- the answer is "no," you're not
10 testifying that only the blind can read books from
11 Internet Archive, are you?

12 A. Other people can read books from the -- that
13 they receive from the Internet Archive site.

14 Q. Thank you. Thank you.

15 When you -- when Internet Archive began making
16 books available for people to read for free on the
17 internet, was the purpose ultimately to make all
18 information available?

19 MR. GRATZ: Objection to form.

20 THE WITNESS: The -- the statement that we put
21 up on the site and also was what we used when we
22 described ourselves is we were building a digital
23 library. And so is that all information? I would say
24 it's building a digital library.

25 Q. BY MS. MCNAMARA: And I believe you've indicated

ATTORNEYS' EYES ONLY

Page 44

1 available at times to different institutions and
2 individuals.

3 Q. Do you agree, Mr. Kahle, that digital books have
4 qualities distinct from physical books, print books?

5 A. Yes.

6 Q. Digital books can be stored more efficiently
7 than physical books?

8 A. Physical books and -- and digitized versions of
9 those books; is that what you're referring to?

10 Q. I'm saying that the digital books rather than
11 the physical books can be stored more efficiently.

12 A. The Internet Archive in general stores both
13 physical books and digital, digitized copies on -- in
14 different facilities. One's on a computer and one's
15 in -- on shelves and in boxes.

16 But in general, the Internet Archive handles
17 media in many different forms.

18 Q. Mr. Kahle, largely Internet Archive stores
19 physical books in warehouses; isn't that right?

20 A. The Internet Archive stores them in physical
21 archives.

22 Q. Containers, physical containers in boxes?

23 A. The -- well, the Open Library of Richmond, which
24 is actually the organization that stores and owns the
25 physical books, those are -- most of the Open Library of

ATTORNEYS' EYES ONLY

Page 45

1 Richmond's collections are in boxes in physical archive
2 facilities.

3 Q. Thank you.

4 Now is it fair to say that with a digital
5 book -- I believe you said this -- it would take 26
6 terabytes to store all the words in the Library of
7 Congress?

8 MR. GRATZ: Objection to form.

9 Q. BY MS. MCNAMARA: In current terms, that's a
10 computer that's about the size of this podium and costs
11 about \$60,000?

12 A. If the -- if they're just the words were on
13 computer hard drives, as like a Microsoft Word documents,
14 a book is about 1 megabyte, and then it's very dense. If
15 they're digitized materials, they're much larger.

16 Q. And that's a distinction between a digital book
17 and a physical book; is it not?

18 MR. GRATZ: Objection to form.

19 Q. BY MS. MCNAMARA: The storage capacity.

20 A. Digitized --

21 MR. GRATZ: Same objection.

22 THE WITNESS: Digitized books are stored on
23 computers, and physical books are stored on shelves and
24 in boxes. So they are -- are they different? They are
25 different.

ATTORNEYS' EYES ONLY

Page 66

1 Q. And does -- with regard to those books to the
2 degree that they are in-copyright books, did you obtain
3 permission from the copyright owners?

4 A. The Internet Archive, as part of its
5 digitization, has -- has permission from copyright owners
6 as well as doing it based on fair use.

7 Q. Do you have a -- can you give me a percentage of
8 the -- let me -- let me start this way: Approximately
9 how many books today are available on Internet Archive?

10 MR. GRATZ: Objection to form.

11 THE WITNESS: The number of things that may have
12 been originally codexes and therefore photographed
13 versions of those codexes, including the public domain, I
14 think the number is approximately 5 million.

15 Q. BY MS. MCNAMARA: Of the 5 million,
16 approximately what percentage of those books are
17 in-copyright books?

18 A. I don't know -- they're modern books. I'm not a
19 lawyer. So they're probably in -- in-copyright books.
20 The books that are available for lending are about
21 2 million.

22 Q. Of the approximately 2 million books, modern
23 books available for lending, what percentage of those
24 books do you have express permission from the copyright
25 owners to lend?

ATTORNEYS' EYES ONLY

Page 67

1 A. The Internet Archive has -- of the 2 million
2 books that are available for lending, small percentage
3 are acquired based on explicit permission to digitize
4 them. Most of these are acquired through donation or
5 through acquisition of the -- of the books.

6 Q. The vast majority of books available for lending
7 are -- you do not have permission from the owners.
8 You're relying on fair use; isn't that right?

9 A. The -- the Internet Archive has legal titles to
10 the books that have been digitized. So they have been
11 acquired through donation or acquisition in the way that
12 libraries acquire physical books.

13 Q. Mr. Kahle, my question to you is: Of the modern
14 books that's made available for lending on Internet
15 Archive, what percentage do you have permission from the
16 copyright owners to copy and distribute those?

17 A. The -- it's not the way that we -- we look at
18 this. The Internet Archive acquires books legally and
19 then digitizes those books for multiple purposes,
20 including digital lending, and so it's done properly.

21 Q. Mr. Kahle, did you obtain permission from the
22 copyright owners for the copying and distribution of any
23 of the works-in-suit? Do you know what I mean by the
24 term "works-in-suit"?

25 A. I believe so.

ATTORNEYS' EYES ONLY

Page 69

1 plaintiffs to scan and make their 127 books available?

2 A. The -- I think I -- I answered that. There's no
3 special contract beyond how libraries and the Internet
4 Archive acquires books. In my knowledge on those 127,
5 did you say, 127 books? 127 books were acquired in the
6 same way that libraries and the Internet Archive
7 generally acquire books.

8 Q. And so you did not have express permission from
9 the plaintiffs to scan those books, did you?

10 A. The -- the -- the Internet Archive does -- in my
11 knowledge for those 127 books, does not have a special
12 contract for how those books should be dealt with on
13 Archive.org beyond how publishers normally distribute
14 their books.

15 Q. You obtain permission to publish music on
16 Internet Archive on occasion, don't you?

17 MR. GRATZ: Objection to form.

18 THE WITNESS: The Internet Archive hosts files
19 that are uploaded. I would not use the term "publish."

20 Q. BY MS. MCNAMARA: I'm saying did you obtain
21 permission from the copyright owners of music to host and
22 make those available on Internet Archive?

23 MR. GRATZ: Objection to form. Outside the
24 scope.

25 THE WITNESS: The -- are -- the Internet Archive

ATTORNEYS' EYES ONLY

Page 80

1 you?

2 A. I would imagine that many books that are older
3 than five years are still in print.

4 Q. And available for purchase as an eBook; isn't
5 that right?

6 MR. GRATZ: Objection to form.

7 THE WITNESS: The Internet Archive has had a
8 very difficult time purchasing eBooks from publishers,
9 but there are some publishers that are selling eBooks,
10 and the Internet Archive actively acquires those.

11 Q. BY MS. MCNAMARA: What efforts, if any, has
12 Internet Archive made to try to acquire eBooks from any
13 of the plaintiffs?

14 A. The Internet Archive employed a person 10,
15 15 years ago for a couple of years to go and attempt to
16 purchase eBooks and was only somewhat successful. And
17 about a year or so ago, the Internet Archive now has
18 another person full-time attempting to purchase eBooks
19 from publishers.

20 Q. And has the Internet Archive purchased any
21 eBooks from any of the plaintiffs in this litigation?

22 A. The plaintiffs of the litigation, to my
23 understanding, have not -- with repeated requests to
24 purchase their eBooks, have not made those -- have not
25 allowed the Internet Archive to purchase those eBooks.

ATTORNEYS' EYES ONLY

Page 81

1 Q. And you're making a distinction between purchase
2 and license; are you not?

3 A. Yes. Our library purchases materials.

4 Q. And you're unwilling to agree to the terms of
5 licensing an eBook; isn't that right?

6 A. The -- we've requested to purchase books from
7 those large and small publishers and do that as much as
8 we can. License terms are often problematic.

9 Q. When in the last five years have you requested
10 to purchase an eBook from any of the plaintiffs in this
11 litigation?

12 A. I believe I have seen an email specifically
13 requesting it from one of the plaintiffs, and they turned
14 us down, and that was, you know, within the last five,
15 ten years.

16 Q. Would that be Penguin Random House?

17 A. I don't remember.

18 Q. Do you believe that publishers should offer
19 eBooks on a perpetual license?

20 MR. GRATZ: Objection to form.

21 THE WITNESS: Our library would be happy to
22 purchase eBooks in the same way that the -- our library
23 purchases and acquires physical books.

24 Q. BY MS. MCNAMARA: Are you aware that one of the
25 plaintiffs licenses eBooks to libraries for a flat fee on

ATTORNEYS' EYES ONLY

Page 82

1 a perpetual basis?

2 MR. GRATZ: Objection to form.

3 THE WITNESS: The -- if the publishers would be
4 willing to sell their eBooks to us, we would be very
5 happy to engage in volume purchasing.

6 Q. BY MS. MCNAMARA: Mr. Kahle, when you say
7 "willing to sell the books," are you saying that there
8 can be no license terms associated with that sale?

9 A. The Internet Archive is always up for
10 conversations.

11 Q. Mr. Kahle, in the last -- since 19 -- since
12 2015, has the Internet Archive attempted to acquire any
13 book from any major publisher on a perpetual-use basis?

14 A. The Internet Archive has tried to buy ePubs on a
15 continuous basis over the last -- I don't know --
16 15 years, yes. We -- the Internet Archive wants to buy
17 eBooks.

18 Q. Has -- has the Internet Archive purchased any
19 books from Wiley Publishers, a plaintiff?

20 A. The Internet Archive has purchased many books
21 from -- from -- from Wiley and gotten donations.

22 Q. I'm talking not about -- I'm talking about
23 ePubs, Mr. Kahle.

24 A. EPubs, not -- not that I'm aware of. I don't
25 think they --

ATTORNEYS' EYES ONLY

Page 83

1 Q. Has Internet Archive --

2 MR. GRATZ: I'm sorry, I'm not sure if the
3 witness was finished with his answer to the previous
4 question.

5 Q. BY MS. MCNAMARA: Please continue.

6 MR. GRATZ: Mr. Kahle, were you finished with
7 your answer?

8 THE WITNESS: I don't think that Wiley has made
9 eBooks available to the Internet Archive to purchase.
10 It's...

11 Q. BY MS. MCNAMARA: If Wiley made its books
12 available on a perpetual-use basis, would the Internet
13 Archive purchase those books?

14 A. If the Internet Archive could purchase ePubs the
15 same -- with the same basic structures that libraries
16 have always bought books from -- from booksellers --
17 usually it's not directly from publishers; there are book
18 resellers and distribution channels -- we'd be thrilled.

19 But that has not been my understanding of the --
20 of the license terms that have been offered.

21 Q. Are you aware that in 2017, all of the
22 plaintiffs made their eBooks available under perpetual
23 licenses --

24 A. No.

25 Q. -- to libraries?

ATTORNEYS' EYES ONLY

Page 84

1 A. I -- the license terms that you're talking about
2 are -- that I have seen are not identical or within a
3 hair's breath of what selling a book has meant for
4 centuries.

5 Q. So because you don't approve of the licensing
6 terms offered by the book publishers; is that fair?

7 MR. GRATZ: Objection to form.

8 THE WITNESS: The Internet Archive engages in
9 engages in conversations big and small publishers all the
10 time and attempts to purchase books. So I -- there's
11 been no -- no change.

12 Q. BY MS. MCNAMARA: How -- of the percentage of
13 books available on the Internet Archive as ePubs, what
14 percentage were at the ePub version purchased by Internet
15 Archive?

16 MR. GRATZ: Objection to form.

17 THE WITNESS: Wow. Let me see if I can say this
18 back.

19 The -- actually, no. Can you please be precise?

20 Q. BY MS. MCNAMARA: Yes.

21 Internet Archive makes available, you said,
22 through CDL approximately 70,000 books a day or 70,000
23 users; is that right?

24 MR. GRATZ: Objection to form.

25 THE WITNESS: The Internet Archive, it is my

ATTORNEYS' EYES ONLY

Page 85

1 understanding, lends about 70,000 books a day.

2 Q. BY MS. MCNAMARA: And what percentage of those
3 were purchased by the Internet Archive, the ePub version,
4 not the physical book? What percentage were purchased?

5 A. I don't -- I don't know the answer to that. And
6 there are many other eBooks that are freely available on
7 the Internet Archive.

8 Q. I'm talking about in-copyright works that are
9 being --

10 A. I'm --

11 Q. That are being distributed through Controlled
12 Digital Lending.

13 A. Okay.

14 Q. Okay? What percentage of the books being
15 distributed in an ePub version through Controlled Digital
16 Lending were purchased by the Internet Archive?

17 MR. GRATZ: Objection to form.

18 THE WITNESS: I don't know the answer.

19 Q. BY MS. MCNAMARA: And do you know whether it's
20 more than 10 percent?

21 A. I think it's unlikely to be more than
22 10 percent.

23 Q. Thank you.

24 Now early on, I think you've already testified
25 Controlled Digital Lending was coined relatively

ATTORNEYS' EYES ONLY

Page 89

1 user that checks out a book from the Internet Archive
2 only looks at it for a few minutes?

3 A. No.

4 Q. You're well aware that thousands and thousands
5 of users who check out books from Internet Archive are
6 capable and may well read the entire book; isn't that
7 right?

8 A. Patrons in a library that check out a book, a
9 book from the Internet Archive, can look at all of the
10 pages in the book, as I have repeatedly said, yes. They
11 can do that.

12 I was just trying to be helpful in giving you
13 context of how do people actually use the service.

14 Q. Well --

15 A. But that may not be what you're after.

16 Q. Well, I'm not asking -- it's not what I'm
17 asking. I'm asking for the truth, Mr. Kahle.

18 You are well aware that a user who checks out a
19 book from the Internet Archive are capable of reading the
20 entire book; isn't that right?

21 A. A patron of the Internet Archive can check out a
22 book from -- using Controlled Digital Lending and flip
23 through or read all of the pages, absolutely. They
24 can --

25 Q. Thank you.

ATTORNEYS' EYES ONLY

Page 97

1 MS. MCNAMARA: This witness is testifying as to
2 how Controlled Digital Lending and how the Internet
3 Archive provide books to readers.

4 Q. And you're telling me you don't have any
5 knowledge as to whether any other limitation is placed on
6 users other than the three limitations you identified?

7 MR. GRATZ: Same objection.

8 THE WITNESS: I don't feel comfortable saying
9 absolute things under oath about all possible systems of
10 the Internet Archive. I think that's...

11 Q. BY MS. MCNAMARA: Is it fair to say that as of
12 about 2013, Internet Archive got rid of any geographic
13 limitations on a user's ability to read books?

14 A. I don't remember the -- what time that was
15 changed, but yes, the -- the Internet Archive made the
16 books under the controlled systems more available than
17 just the network's addresses and geographies that were
18 supplied by -- by libraries.

19 Q. And now books are available on the Internet
20 Archive websites to anyone in the world?

21 A. The Internet Archive's -- if you're talking
22 about the Controlled Digital Lending, the books via
23 Controlled Digital Lending?

24 Q. Yes. They're available to anyone in the world
25 who has access to an internet connection; isn't that

ATTORNEYS' EYES ONLY

Page 139

1 responsibilities associated with owning a physical book.

2 Q. Have -- has Internet Archive purchased or
3 licensed any books from HarperCollins after January 2018,
4 to your knowledge?

5 A. Purchased books?

6 Q. No, purchased or licensed any eBooks.

7 A. eBooks.

8 Q. Right.

9 A. Not that I'm aware of. The big publishers have
10 not been selling books -- eBooks, at least to us, that
11 we're -- that I'm aware of.

12 Q. You are aware that over the years, book
13 publishers make eBooks available under a perpetual
14 license; are you not?

15 MR. GRATZ: Objection to form.

16 THE WITNESS: Didn't we cover this?

17 Q. BY MS. MCNAMARA: Well --

18 A. So the big -- so we've asked to purchase eBooks
19 from many publishers, and some publishers have said yes
20 and are happy to take our money. I'm not aware that --
21 this publisher was HarperCollins -- allowed us to -- or
22 offered, really, or made -- allowed us to buy eBooks.

23 Q. Can you identify for me, other than the
24 publisher you previously identified in your testimony
25 that I believe was in San Francisco, can you identify any

ATTORNEYS' EYES ONLY

Page 140

1 publisher where you have purchased eBooks?

2 A. Yes.

3 MR. GRATZ: Objection to form.

4 You can answer.

5 Q. BY MS. MCNAMARA: Tell me the -- tell me the
6 name of the publisher.

7 A. So PM Press, which I mentioned before. AK Press
8 has sold us eBooks. I believe 11:11 has sold us eBooks.
9 There's -- it's a program of the Internet Archive to
10 purchase eBooks from authors, from publishers. Just as
11 any library would buy a physical book, we're attempting
12 to buy eBooks.

13 Q. But you're aware that thousands of libraries
14 across the United States license eBooks from the
15 publishers; are you not?

16 A. I don't know how they -- how they work. I think
17 a lot of libraries have deals with OverDrive where they
18 direct their users to OverDrive. So I'm not sure how
19 they -- how they work.

20 Q. Are you aware, Mr. Kahle, that Hachette is
21 another plaintiff in this litigation?

22 A. Yes.

23 Q. Are you aware that Hachette has sent takedown
24 notices for hundreds, if not thousands of its titles
25 prior to filing this litigation?

ATTORNEYS' EYES ONLY

Page 173

1 back to MIT Press, and we don't know if they -- what they
2 have done with those books, and we are not sort of in
3 conversation with them on that.

4 Q. BY MS. MCNAMARA: But you're not monitoring your
5 partner libraries, you've already indicated. You're not
6 monitoring them to know whether they have books in open
7 stacks that could be lent at the same time as a digital
8 version, are you?

9 A. We don't have people going and snooping around
10 Boston Public Library, no. That doesn't -- no.
11 Libraries are honorable institutions.

12 Q. In fact, you're aware, are you not, or Internet
13 Archive is aware that some libraries don't even try to do
14 anything to suppress circulation and instead assume that
15 the large number of physical and eBooks included for IA's
16 site, based on the overlap analysis, the likelihood is
17 slim that the physical and eBooks are going to be checked
18 out at the same time.

19 Are you aware of that?

20 MR. GRATZ: Objection to form.

21 THE WITNESS: No.

22 MS. MCNAMARA: Okay. Let me show you. Let's
23 have marked as the next exhibit, tab 169.

24 MR. BROWNING: It will be available in just a
25 minute.

ATTORNEYS' EYES ONLY

Page 173

1 back to MIT Press, and we don't know if they -- what they
2 have done with those books, and we are not sort of in
3 conversation with them on that.

4 Q. BY MS. MCNAMARA: But you're not monitoring your
5 partner libraries, you've already indicated. You're not
6 monitoring them to know whether they have books in open
7 stacks that could be lent at the same time as a digital
8 version, are you?

9 A. We don't have people going and snooping around
10 Boston Public Library, no. That doesn't -- no.
11 Libraries are honorable institutions.

12 Q. In fact, you're aware, are you not, or Internet
13 Archive is aware that some libraries don't even try to do
14 anything to suppress circulation and instead assume that
15 the large number of physical and eBooks included for IA's
16 site, based on the overlap analysis, the likelihood is
17 slim that the physical and eBooks are going to be checked
18 out at the same time.

19 Are you aware of that?

20 MR. GRATZ: Objection to form.

21 THE WITNESS: No.

22 MS. MCNAMARA: Okay. Let me show you. Let's
23 have marked as the next exhibit, tab 169.

24 MR. BROWNING: It will be available in just a
25 minute.

ATTORNEYS' EYES ONLY

Page 176

1 conversations with their attorneys are to be figured out
2 how they want to comply.

3 Q. BY MS. MCNAMARA: So also, you're aware that
4 libraries routinely weed out books from their
5 collections; isn't that correct?

6 A. Correct.

7 Q. And does Internet Archive audit library
8 collections to ensure that the library still owns the
9 physical copy it's lending against?

10 A. No. The -- the Internet Archive doesn't snoop
11 around dumpsters or things. I -- so no. The
12 libraries -- this is a partnership with libraries to
13 operate on their behalf, lending books on their behalf
14 under the Controlled Digital Lending principles.

15 So this is -- this is not represented as the
16 Internet Archive; this is represented as theirs, and they
17 understand that.

18 Q. But you -- you're aware that the user on
19 Archive.org is, in fact, acquiring the books from the
20 Internet Archive?

21 MR. GRATZ: Objection to form.

22 THE WITNESS: The -- the libraries are not -- in
23 this case, they do not acquire a book from the Internet
24 Archive, no.

25 Q. BY MS. MCNAMARA: I'm saying that users of

ATTORNEYS' EYES ONLY

Page 182

1 levels, and who was using it and who it was affecting.

2 And so based on all of those controls, because
3 in the early pandemic, we couldn't get through to the IT
4 groups of those libraries to be able to do overlap
5 guides, and the -- and the urgency was very acutely felt
6 by parents, teachers, and librarians.

7 Q. Thank you, Mr. Kahle.

8 I didn't ask you why you implemented the
9 National Emergency Library. I asked you a very technical
10 question.

11 When the National Emergency Library was
12 implemented, Internet Archive turned off any restriction
13 on the number of copies that a book could -- a number of
14 copies of a book that could be lent at the same time?

15 A. The Internet Archive suppressed the wait-list
16 function and then monitored extremely carefully what was
17 going on on the systems so that there was no runaway
18 usage, I think as your question implies.

19 Q. I just asked you a very simple question, which
20 is: Who you say "suppress the wait lists," is that
21 synonymous with doing away with the one-to-one ratio?

22 A. Yes. The -- we --

23 Q. Thank you. That's -- that's the answer. Thank
24 you.

25 A. Oh, great. I wish you'd asked the question that

ATTORNEYS' EYES ONLY

Page 191

1 A. The Internet Archive tries to buy all the eBooks
2 it possibly can so that it can go and make those
3 available, but it does not take things off to make a hole
4 in the library based on its being made available as an
5 eBook from other places.

6 Q. And you're aware that virtually -- you're aware
7 that every one of the books at issue in this litigation,
8 the representative sample of 127 books, you're aware that
9 those books are all available in eBook form for purchase;
10 are you not?

11 MR. GRATZ: Objection to form.

12 THE WITNESS: I'm not -- I'm not aware of that,
13 but it's probably a pretty good guess. That's why they
14 picked them.

15 Q. BY MS. MCNAMARA: Are you aware that there are
16 thousands of other books published by publishers that are
17 available in eBook form that are also available on
18 Internet Archive's website?

19 A. Similarly, I -- I -- I don't know that, but
20 I'm -- thousands of books, yeah. I don't doubt it.

21 Q. And when you previously testified, Mr. Kahle, to
22 purchasing eBooks, I believe you indicated a few
23 publishers. PM Publisher was one of them; is that right?

24 A. PM Press. They're a great press.

25 Q. Okay. How do you -- how does Internet

ATTORNEYS' EYES ONLY

Page 192

1 Archive -- what is the -- what are the terms of that
2 purchase of an eBook from PM Press?

3 A. We pay them money and they give us a digital
4 file.

5 Q. They -- and are there any restrictions on your
6 ability to disseminate that digital file?

7 A. Absolutely. They're all embedded -- they're
8 embedded in law.

9 Q. They're embedded in what?

10 A. In law.

11 Q. In law. What do you mean by that?

12 A. We can do what is permitted by law.

13 Q. What do you mean by that? What can you do that
14 is permitted by law?

15 A. Makes books available to the blind and dyslexic,
16 make books available through Controlled Digital Lending,
17 and there's going to be evolution of how laws change.
18 Just as the Chaffee Amendment came along at some point,
19 the -- even now countries are ratifying the Marrakech
20 Treaty.

21 So there is an evolution according to law as
22 opposed to license or contract.

23 Q. What terms, if any, are imposed by PM Press
24 concerning the digital books it sells to you?

25 A. That we are law-abiding citizens.

ATTORNEYS' EYES ONLY

Page 193

1 Q. Is there DRM on the -- on the book file that you
2 get from PM Press?

3 A. PM Press gives us an in-the-clear ePubs that we
4 can then load in an our DRM systems.

5 Q. I'm sorry, could you repeat that again?

6 A. PM Press gives us files that are in the clear
7 that we can then load into our DRM systems for patron
8 access.

9 Q. What does "in the clear" mean?

10 A. Non-encrypted.

11 Q. So they give you non-encrypted files that you
12 then load into your Adobe system?

13 A. Correct.

14 Q. And is there any restrictions placed on those
15 sales as to how long or how often those books are lent?

16 A. The restrictions are embedded in law.

17 Q. But there's no restrictions placed on the
18 publisher, by the publisher?

19 A. No more than is just in law. So the Internet
20 Archive obeys the law as libraries are wont to do.

21 Q. So when they give you that file, you could just
22 reproduce it if you wanted?

23 MR. GRATZ: Objection to the form.

24 THE WITNESS: The Internet Archive obeys the
25 law, so...

ATTORNEYS' EYES ONLY

Page 194

1 Q. BY MS. MCNAMARA: And central to the law is the
2 one-to-one ratio; is it not?

3 MR. GRATZ: Objection to the form.

4 Q. BY MS. MCNAMARA: Central to the law, as you
5 understand it, Mr. Kahle, is the one-to-one ratio is
6 complied with; correct?

7 A. There are many uses that one can make of a book
8 based on -- on law, and that -- and what is understood as
9 what is proper in law evolves over time.

10 So there's Controlled Digital Lending is one
11 aspect of the use that the Internet Archive makes of the
12 books, eBooks from PM Press.

13 A. I'm not sure if I understand your answer,
14 Mr. Kahle, and it's probably me, not you.

15 But are you saying that -- that PM Press places
16 no restrictions on you that you could reproduce the file
17 it provides you?

18 MR. GRATZ: Objection to form.

19 THE WITNESS: The -- PM Press assumes, and
20 properly assumes, that we obey the law.

21 Q. BY MS. MCNAMARA: And similar to the fact that
22 you assume that your cooperating libraries or partner
23 libraries comply with the one-to-one ratio; is that
24 right?

25 A. We assume that other libraries obey the law as

ATTORNEYS' EYES ONLY

Page 195

1 they understand it.

2 Q. So you assume that they will comply with the
3 one-to-one ratio and always keep the physical copy not
4 available for circulation; is that right?

5 MR. GRATZ: Objection to form.

6 THE WITNESS: We assume they obey the law. They
7 understand the Controlled Digital Lending idea. They
8 also understand the -- the blind and dyslexic provisions.
9 These are commonly understood laws within the library
10 field.

11 Q. BY MS. MCNAMARA: Do you recall that -- one of
12 the advisors you have relied on with regard to Controlled
13 Digital Lending is Pam Samuelson; is it not?

14 A. I think "relied on" would be not necessarily the
15 right way to put it. Pam Samuelson was one of the
16 participating academic librarians and academic lawyers,
17 but also with other lawyers that came up with the
18 principles, the Controlled Digital Lending principles.

19 Q. Back on purchasing books, Mr. Kahle, is it a
20 condition for Internet Archive to purchase an eBook from
21 a publisher that that eBook not have DRM on it?

22 A. I'm sorry. Can you he please repeat?

23 Q. Is it a condition for the Internet Archive to
24 purchase an eBook from a book publisher that the eBook
25 should not have DRM on it?

ATTORNEYS' EYES ONLY

Page 204

1 in that way.

2 Q. Okay. Well, let's find a participating -- a
3 public library that -- can you identify a public library
4 that participates in Controlled Digital Lending through
5 the overlap analysis with Internet Archive?

6 A. Well, let's see. I'm coming short on public
7 libraries. How about MIT Libraries?

8 Q. Well, MIT is special because MIT only puts into
9 circulation books that they have obtained permission from
10 the owner or -- or the like.

11 A. Are you thinking of MIT Press?

12 Q. Yes, I'm thinking of MIT Press.

13 A. MIT Press actually is the publisher of those
14 books.

15 Q. Right.

16 A. But there's MIT Libraries is a participate in --
17 participant in the Open Libraries program.

18 Q. Okay.

19 A. So they're a partner library with the Internet
20 Archive.

21 Q. Okay. So if MIT Press did a match with Internet
22 Archive, and they had -- and they physically owned one
23 copy of The Bell Jar and that matched with the Internet
24 Archive's, then the number of copies, of digital copies
25 that Internet Archive could lend of The Bell Jar would

ATTORNEYS' EYES ONLY

Page 205

1 increase by one; isn't that right?

2 A. If I could just make a minor -- you did so well,
3 but you said MIT Press. If I just stuck in -- take out
4 "Press" and stuck in "Libraries," the whole rest of your
5 statement, then -- and they had a copy of, you know,
6 actually some chemistry treatise, and we did as well,
7 then it would go from one to two copies to -- our catalog
8 would then show two such that there could be two
9 simultaneous borrowers of that book, and they could read
10 it at any -- at one time.

11 Q. And then if another library became a partner
12 library and there was a match of the exact same book,
13 then you would increase the number of concurrent users by
14 one again; would you not? So now you have two copies of
15 concurrent users; is that right?

16 MR. GRATZ: Objection -- objection to form.
17 You can answer.

18 THE WITNESS: The -- in general, that's the --
19 the approach, is to have only one each partner library if
20 there is a direct match, then it will increase the number
21 of concurrent borrowers by one, independent of the number
22 that they have in the library.

23 Q. BY MS. MCNAMARA: So -- so I'm just making I
24 understand -- I'm making sure I understand this process.

25 So now if we are up to three concurrent users

ATTORNEYS' EYES ONLY

Page 206

1 can download the same book because there's been matches
2 from these different libraries; is that right, that
3 that's what's happened?

4 A. You've just slipped the term. I don't know if
5 you realized it.

6 People don't download these; they -- they borrow
7 the books through the Controlled Digital Lending and the
8 DRM systems so the --

9 Q. When I say --

10 A. On purpose.

11 Q. No. Mr. Kahle, when I say "download," the
12 borrower can read the book via the Internet Archive
13 website; correct?

14 A. Okay. They -- they can read it through the
15 different readers that are controlled. But "download," I
16 think, would be not the right way to -- to look at it.

17 Q. Okay. So now we're up to three copies of the
18 same book that can be concurrently read off of the
19 Internet Archive; correct?

20 A. Correct.

21 Q. Okay. So now if we're back at the MIT
22 Libraries, it only has one copy. A use --

23 A. How's that?

24 Q. One physical copy. A user of MIT, three
25 different users at the MIT Libraries could go on Internet

ATTORNEYS' EYES ONLY

Page 207

1 Archive and down -- and read the same book at the same
2 time; is that correct?

3 A. While those books are registered as
4 noncirculating physically, then three could check out
5 that book on Archive.org.

6 Q. Okay. Even though MIT Libraries only purchased
7 and owns one physical copy of the book?

8 MR. GRATZ: Objection to form.

9 THE WITNESS: How they acquired their books,
10 I -- I -- I -- I don't know.

11 Q. BY MS. MCNAMARA: I'm not asking you --

12 A. But the three different patrons of the Internet
13 Archive can borrow a book.

14 Q. And three of -- and those same three patrons
15 could also be patrons of the MIT Libraries; correct?

16 A. Correct.

17 Q. Okay. Now another component to Controlled
18 Digital Lending, as I understand it, is that the book
19 must be -- the physical book must have been lawfully
20 acquired; is that correct?

21 A. I -- that sounds like what the lawyers would put
22 in their briefs.

23 Q. But is that what you understand? You're the
24 guru of Controlled Digital Lending of -- of Internet
25 Archive.

ATTORNEYS' EYES ONLY

Page 208

1 A. No, I'm sorry. I am -- I'm -- I'm the -- I'm
2 the digital librarian of the Internet Archive.

3 Q. Okay. And a feature of Controlled Digital
4 Lending is that the work is lawfully acquired; isn't that
5 correct?

6 A. That -- the Internet Archive lawfully acquires
7 the -- the books we have in Controlled Digital Lending.

8 Q. Okay. Are you familiar with a pirate site
9 called Libgen?

10 A. Yes.

11 Q. And are you aware that it has been the subject
12 of multiple injunctions for copyright infringement?

13 A. No.

14 Q. Are you aware that the Internet Archive has
15 downloaded digital copies of its copyright websites --

16 A. Yes.

17 Q. -- from Libgen?

18 MR. GRATZ: I'm sorry. Objection to form.

19 THE WITNESS: So I'm aware that the Internet
20 Archive has archived in a dark archive the -- the
21 collection that is commonly understood to be Libgen. But
22 what website that is and things like that are all -- it's
23 a fuzzy, fuzzy issue.

24 Q. BY MS. MCNAMARA: Do you know how many Libgen
25 books are currently hosted on Internet Archive's web

ATTORNEYS' EYES ONLY

Page 209

1 servers?

2 MR. GRATZ: Objection to form.

3 THE WITNESS: The Internet Archive doesn't host
4 them on our web servers. The Internet Archive holds
5 preservation copies of some of the files from Libgen.

6 Q. BY MS. MCNAMARA: Do you know how many?

7 A. No, I don't.

8 Q. Do you know who uploaded the books from Libgen
9 at the Internet Archive?

10 A. I believe so.

11 Q. Who?

12 A. Aaron Zimm.

13 Q. Who is that?

14 A. An engineer that works for the Internet Archive.

15 Q. Had he been told to upload books from that
16 source?

17 A. It was -- it was a project of the Internet
18 Archive to archive the internet and the -- and a lot of
19 different factors of the internet, and Libgen is part of
20 that. So it's part of our mission.

21 Q. And you at one time inquired or suggested to
22 Amy Brand that she could -- would she be okay with
23 opening up 3,000 MIT Press books from Libgen?

24 A. That's not how I remember it.

25 Q. Tell me how you remember it.

ATTORNEYS' EYES ONLY

Page 210

1 A. Amy asked me how many books were in -- MIT Press
2 books were in Libgen, and I said I could probably answer
3 that question.

4 MS. MCNAMARA: Let me show you.

5 Jack, why don't we post tab 186.

6 MR. BROWNING: Coming up now. I'll let you know
7 when to refresh.

8 (Exhibit 262, Email string from Brewster Kahle
9 to Amy Brand, 02/12/17, with attachments,
10 INTARC00393109 - 111, was marked for
11 identification by counsel electronically.)

12 MR. BROWNING: Okay. Tab 186 has been
13 introduced as Plaintiffs' Exhibit 262, and if you refresh
14 your browser, you should be able to see it.

15 THE WITNESS: Spinning.

16 Q. BY MS. MCNAMARA: Do you see it now, Mr. Kahle?

17 A. No. It's still spinning. Coming in, coming in.
18 Okay. Exhibit 262?

19 Q. Yes.

20 A. Okay.

21 Q. Do you see that there's an email to you from
22 Amy Brand on February 12th, 2017?

23 A. It appears so, yes.

24 Q. And can you identify who Amy Brand is?

25 A. Amy Brand is the executive director of the

ATTORNEYS' EYES ONLY

Page 211

1 MIT Press. And actually, I don't know what her title
2 exactly -- director. She's director.

3 Q. And do you see here in February 2017 you say to
4 Ms. Brand: "Would you be okay with our opening up the
5 3K" -- or 3,000 -- MIT Press books from Libgen for
6 one-at-a-time lending on Open Library (we do not have the
7 borrow in your local library thing yet)"?

8 A. I see that.

9 Q. So you were proposing to Ms. Brand that you
10 upload 3,000 MIT books from Libgen?

11 MR. GRATZ: Objection to form.

12 THE WITNESS: No.

13 Q. BY MS. MCNAMARA: What were you doing?

14 A. Since she's the publisher of the MIT Press, she
15 would be in the position to be able to give us permission
16 to use scans of MIT Press books, and I was asking --
17 after she had asked how many MIT Press books were in
18 Libgen, and that's the reason why I went and did the --
19 the analysis, I asked can we make them available through
20 lending.

21 Q. And did you, in fact, make them available
22 through lending?

23 A. We did not make those -- those available through
24 lending, but we did make a large number of other MIT
25 Press books available for lending.

ATTORNEYS' EYES ONLY

Page 235

1 offered to delay today's deposition until you were ready
2 to take it, and you said no. Let's keep going.

3 MS. MCNAMARA: Okay.

4 Q. The -- Mr. Kahle, prior to the commencement of
5 this action, books that were available on Archive.org for
6 reading were available generally for 14 days; isn't that
7 right?

8 A. Yes. When we went into -- when the pandemic
9 hit, it was a 14-day-only system.

10 Q. And after the commencement of this action,
11 Internet Archive changed its policies so that the default
12 was a one-hour loan; is that right?

13 A. The -- I don't remember what the date of the
14 action on all this. The HathiTrust demonstrated the
15 one-hour loan version, and based on our analysis of how
16 short people were using sort of these books as reference,
17 we introduced the one-hour loan.

18 Q. Would it be consistent with your understanding
19 that that introduction of the default one-hour loan came
20 in approximately June of 2020?

21 A. It came approximately -- approximately then.

22 Q. And it's your understanding that a book is
23 available for a one-hour loan only if the library has one
24 physical copy in its system; is that right?

25 MR. GRATZ: Objection to form.

ATTORNEYS' EYES ONLY

Page 287

1 STATE OF CALIFORNIA) ss:

2 COUNTY OF MARIN)
3

4 I, LESLIE ROCKWOOD ROSAS, RPR, CSR NO. 3462, do
5 hereby certify:

6 That the foregoing deposition testimony was
7 taken before me at the time and place therein set forth
8 and at which time the witness was administered the oath;

9 That testimony of the witness and all objections
10 made by counsel at the time of the examination were
11 recorded stenographically by me, and were thereafter
12 transcribed under my direction and supervision, and that
13 the foregoing pages contain a full, true and accurate
14 record of all proceedings and testimony to the best of my
15 skill and ability.

16 I further certify that I am neither counsel for
17 any party to said action, nor am I related to any party
18 to said action, nor am I in any way interested in the
19 outcome thereof.

20 IN WITNESS WHEREOF, I have subscribed my name
21 this 12th day of December, 2021.
22

23 
24

25 LESLIE ROCKWOOD ROSAS, RPR, CSR NO. 3462